BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARCUS J. BUTLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,024,760
CESSNA AIRCRAFT COMPANY	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the June 5, 2009, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on October 21, 2009.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties agreed claimant's discovery deposition was not part of the record nor any medical hearsay from the April 20 and October 24, 2006, and October 9, 2007, preliminary hearings.[1]

ISSUES

This is a claim for a June 22, 2005, accident and resulting back injury. In the June 5, 2009, Award, Judge Barnes found claimant sustained a 15 percent whole person functional impairment after averaging the impairment ratings provided by Dr. Pedro A. Murati, Dr. Chris D. Fevurly, and Dr. Pat D. Do. Moreover, Judge Barnes found claimant failed to prove he was permanently and totally disabled from substantial, gainful employment. Consequently, the Judge denied claimant's request for permanent total disability benefits.

[1] R.H. Trans. at 13-24.

The Judge also denied claimant's request for a work disability[2] after finding claimant was terminated by respondent for cause; namely, for failing to disclose an earlier workers compensation injury and settlement on a health history questionnaire. Accordingly, the Judge granted claimant permanent partial general disability benefits for a 15 percent whole person functional impairment. Judge Barnes also denied claimant's request for additional temporary total disability benefits and similarly denied claimant's request to assess Dr. James A. Littell's witness fee to respondent.

Claimant cites the recent *Bergstrom*[3] decision and argues that the Judge erred by applying a good faith test in determining the extent of claimant's permanent partial general disability. Accordingly, claimant requests the Board to remand this claim to the Judge with directions to award claimant a work disability and to further consider his request for additional temporary total disability benefits. In the alternative, claimant requests the Board to enter an award for the additional temporary total disability benefits claimed and an 80.5 percent work disability, which represents a 100 percent wage loss and 77 percent task loss. In addition, claimant challenges the charges of Dr. Littell of $450 for his testimony. Claimant maintains the doctor testified as a fact witness and, therefore, his fee is limited to whatever amount is allowed by K.S.A. 44-553. Moreover, claimant contends Dr. Littell's fee should be assessed against respondent.

Respondent contends: (1) it had just cause to terminate claimant and, therefore, claimant's permanent disability award should be limited to his functional impairment rating; (2) claimant is not entitled to additional temporary total disability benefits as claimant could have continued working for respondent had he not been terminated; (3) the Board should adopt the opinion of the Judge's independent medical examiner, Dr. Do, and find that claimant has sustained a 10 percent whole person functional impairment; (4) if a work disability is appropriate, the Board should find claimant failed to cooperate with respondent's vocational expert and, consequently, penalize claimant by finding he has a zero percent task loss; (5) similarly, should a work disability be appropriate, the Board should find a 38 percent wage loss, which is based upon an imputed post-injury wage and the opinion of respondent's vocational expert that claimant retains the ability to earn $12.08 per hour in wages and $1.46 per hour in benefits; and (6) Dr. Littell's $450 witness fee should be paid by claimant.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injuries and disability?

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[2] A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[3] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

2. Is claimant entitled to receive temporary total disability benefits for October 24, 2005, to May 14, 2006, and from September 10, 2006, to May 29, 2007?

3. Which party should pay Dr. James A. Littell's witness fee and in what amount?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties agree that on June 22, 2005, claimant was working for respondent as a sheet metal assembler and that he injured his back while adjusting a jig. The parties also agree that claimant's accident and resulting injury arose out of and in the course of his employment with respondent.

Claimant initially received medical treatment from respondent's medical department. When claimant's back complaints did not resolve, respondent referred claimant to an orthopedic surgeon, Dr. John P. Estivo. Approximately a month after the accident, respondent provided claimant with light duty work. Claimant was performing that light duty work when he was terminated by respondent on October 24, 2005. On June 1, 2006, claimant underwent back surgery. Claimant neither worked nor drew unemployment benefits between the date of his termination and date of surgery. Claimant's testimony is uncontradicted that he was denied unemployment benefits because of his termination.

Respondent commenced paying claimant temporary total disability benefits on May 14, 2006. Those benefits continued until September 10, 2006, when claimant began looking for work. During his job search, one aircraft manufacturer rescinded a job offer it had made to claimant and another company declined to hire him after having him undergo a physical.

When claimant testified at his April 2008 regular hearing, he remained unemployed. Despite having undergone surgery, claimant was nevertheless experiencing pain from his low back to his neck, when initially his back pain only went to his shoulder blades.[4] Claimant could not say when his neck pain began, but he did recall going to the emergency room in 2006 (approximately five months after his back surgery) when his legs gave way and caused him to fall and hit his head. In April 2007 claimant made another trip to the emergency room for his neck when he woke up and was unable to move his left arm. He was diagnosed at that time, according to claimant, as having cervical spondylosis. Claimant

[4] R.H. Trans. at 58.

testified that other than his two emergency room visits, no doctor has evaluated and treated his neck.

Claimant's termination

Claimant first began working for respondent in March 2002. But after seven months he was laid off along with many others. In September 2004, claimant resumed working for respondent after again completing respondent's application process. Unlike when he first applied to work for respondent, on the second occasion claimant did not disclose on a health questionnaire that he had received a workers compensation settlement for a knee injury. Both in 2002 and 2004 claimant executed releases that permitted respondent or its investigators to obtain claimant's records at the Division of Workers Compensation.

On October 24, 2005, respondent terminated claimant for failing to disclose his earlier knee injury and workers compensation claim on the 2004 health questionnaire. Claimant contends he merely made a mistake when completing the form.[5] Based upon that termination respondent contends claimant is not eligible to receive a work disability. Similarly, respondent contends it is not liable for any additional temporary total disability benefits as it would have continued to accommodate claimant's June 2005 back injury.

Additional temporary total disability compensation

Claimant requests additional temporary total disability compensation from October 24, 2005 (when he was terminated), to May 14, 2006 (when respondent began paying temporary total disability compensation before claimant's June 1, 2006, back surgery). In addition, claimant requests temporary total disability benefits from September 10, 2006 (when respondent ceased paying temporary total disability benefits following claimant's back surgery), to May 29, 2007 (when claimant asserts he ultimately reached maximum medical recovery).

When claimant was terminated, respondent was accommodating claimant's back injury by providing him light duty work, which claimant described as working with small parts. Claimant indicated that between his October 24, 2005, termination and his June 1, 2006, back surgery, he did not try very hard finding other work because his back condition remained in question.[6] Records from respondent's medical department, which the parties stipulated into evidence, indicate that on July 29, 2005, claimant was restricted from pushing, pulling, or lifting more than 30 pounds. In addition, claimant was restricted to

[5] Cont. of R.H. Trans. at 10.

[6] R.H. Trans. at 41.

occasional bending, twisting, squatting, and told to avoid both awkward positions and repetitive bending.

Dr. Moufarrij, the surgeon who performed claimant's June 2006 low back surgery, did not testify in this claim. But claimant testified he believed the doctor had him off work for the surgery for a couple of months.[7]

Claimant's expert medical witness, Dr. Pedro A. Murati, who is board-certified in electrodiagnostic medicine and rehabilitation and physical medicine, did not testify specifically about claimant's ability to work during the two periods in question. But the doctor did examine claimant on March 9, 2006 (before claimant's low back surgery), and issued a report. In that report, the doctor diagnosed (1) low back pain secondary to polyradiculopathy, (2) probable neurogenic bladder, and (3) erectile dysfunction. Dr. Murati recommended a urological workup, a series of steroid injections, and then surgery if conservative treatment did not resolve claimant's symptoms.

Dr. Murati did not state in his March 2006 medical report that claimant was unable to work but the doctor recommended numerous work restrictions; namely, limiting claimant's sitting, standing, walking, climbing stairs and ladders, squatting, and driving to an occasional basis only; limiting bending, crouching, and stooping to rarely; prohibiting crawling; prohibiting all lifting, carrying, pushing, and pulling greater than 10 pounds; limiting occasional lifting to no more than 10 pounds; and alternating sitting, standing, and walking. The doctor also appeared to limit claimant's frequent lifting activities to 5 pounds, but the doctor's notation is not very legible. Finally, Dr. Murati appears to have recommended that claimant be allowed to lie down approximately 30 minutes every 2 hours.[8]

At the other end of the spectrum are the opinions of Dr. Chris D. Fevurly, who examined claimant in early April 2008 at respondent's request. Dr. Fevurly, who is board-certified in internal medicine, preventative medicine, and occupational medicine, believes claimant could have worked in an unrestricted manner before the June 2006 surgery.[9] Moreover, he believes there is a good possibility that claimant intentionally misrepresented his condition before undergoing surgery.[10]

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[7] *Id.,* at 42.

[8] Murati Depo., Ex. 5.

[9] Fevurly Depo. at 65.

[10] *Id.*, at 50.

The Workers Compensation Act provides that temporary total disability exists "when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."[11]

Dr. Murati was in the best position to comment upon claimant's condition for that period between claimant's termination and his back surgery as the doctor examined claimant on March 9, 2006. Based upon Dr. Murati's findings and conclusions from that examination, the Board finds it is more probably true than not that claimant was unable to work at that time. Unfortunately, neither the doctor's report nor the doctor's testimony reveals when claimant's condition worsened to the point he was unable to work after being terminated from his light duty job.

Based on the above, the Board concludes claimant is entitled to receive additional temporary total disability benefits for the period from March 9, 2006, to May 14, 2006, a period of 9.43 weeks.

Claimant's request for additional temporary total disability benefits for that period following his back surgery is a different situation, however. Dr. Murati examined claimant on two occasions after claimant's June 2006 surgery. On October 2, 2006, Dr. Murati examined claimant and diagnosed (1) status post fusion with laminectomy posteriorly at the level of L4-S1, (2) low back pain secondary to radiculopathy, (3) right SI joint dysfunction, and (4) probable neurogenic bladder, improving. The doctor wrote in his October 2006 report that claimant was not able to work at that time and he would be unable to return to work until he overcame his need to rest for at least 30 minutes every hour. Dr. Murati also recommended better pain management, slow-release pain medications, urology evaluation, continuing use of a cane for mobility, and continuing use of a back brace for stability and support.[12]

When Dr. Murati examined claimant on July 7, 2007, the doctor recommended certain work restrictions, although he also believed claimant was essentially and realistically unemployable. In addition, Dr. Murati again recommended a better course of pain management and that claimant wean himself from his back brace and walk as much as possible to strengthen his back. This time Dr. Murati diagnosed failed back surgery syndrome and myofascial pain syndrome affecting the left shoulder girdle extending into the cervical paraspinals and rated claimant under the AMA *Guides*[13] as having a 25 percent

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[11] K.S.A. 44-510c(b)(2).

[12] Murati Depo., Ex. 6 at 3.

[13] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

whole person impairment for the failed fusion and laminectomy at L4-S1 and a 5 percent whole person impairment for the myofascial pain in the cervical paraspinals. Combining those impairments, the doctor found claimant's whole person impairment was 29 percent.

Board-certified orthopedic surgeon Dr. Pat D. Do examined claimant at the Judge's request on March 19, 2007. Dr. Do diagnosed status post multilevel fusion with laminectomy with residual pain and radicular symptoms. Dr. Do found claimant had reached maximum medical improvement and rated claimant under the AMA *Guides* as having a 10 percent whole person impairment because claimant had radicular symptoms; namely, shooting pain down his leg.[14] The doctor recommended work restrictions:

> I would limit [claimant] to bending 90 degrees occasional, 45 degrees frequently, twisting[,] turning occasionally, sitting occasionally, walking, standing occasionally, and rotate positions every 30 minutes. Weight limitations 10 pounds occasionally, 5 pounds frequently, push and pull the 20 pounds occasional, 10 pounds frequently, and 5 pounds continuously.[15]

As previously indicated, Dr. Fevurly examined claimant in April 2008. Dr. Fevurly rated claimant as having a 5 percent whole person impairment under the fourth edition of the AMA *Guides*. The doctor, however, also indicated that considering claimant's condition following surgery claimant's whole person functional impairment rating would be approximately 28 percent using the sixth edition of the *Guides*.[16] Dr. Fevurly did not believe claimant's neck complaints were related to the June 2005 accident.[17] Dr. Fevurly also concluded claimant could perform medium to heavy work, with restrictions of 50 pounds lifting on an occasional basis and 35 pounds on a frequent basis.[18]

Following claimant's June 2006 back surgery, respondent provided temporary total disability benefits to September 10, 2006. Dr. Do examined claimant on March 19, 2007, and determined that claimant had reached maximum medical recovery. The doctor, however, did not indicate when claimant's condition had reached that point. The Board is persuaded by Dr. Do's opinions and finds that claimant had reached maximum medical recovery by March 19, 2007. The record, however, fails to establish when claimant's condition changed from temporary to permanent. The Board is cognizant that Dr. Murati

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[14] Do Depo. at 8.

[15] *Id.*, Ex. 2 at 4.

[16] Fevurly Depo. at 64.

[17] *Id.*, at 24.

[18] *Id.*, Ex. 2 at 9.

opined claimant was temporarily and totally disabled at the October 2006 examination, but the doctor also believed claimant was unable to work at the July 2007 examination. Accordingly, there is no significant difference in claimant's ability to work between Dr. Murati's two post-surgery exams.

Stated another way, claimant's condition had become permanent by March 19, 2007, but the evidence fails to establish when claimant had reached that status. Consequently, the Board concludes claimant has failed to satisfy his burden of proof regarding this issue and, therefore, claimant's request for additional temporary total disability benefits following his back surgery should be denied.

Dr. James A. Littell's deposition

Dr. James A. Littell never examined claimant. Nonetheless, claimant's attorney took Dr. Littell's deposition on May 30, 2008. Claimant's attorney represents he gave the doctor a $15 witness fee with his subpoena.

The doctor testified he is employed by his own professional association, James A. Littell, M.D., P.A., which subcontracts with Pro-Med (owned by Drs. Larry Wilkinson and A. J. Reed), which ostensibly contracts with respondent for providing in-house physician services.

Besides questioning the doctor about his medical background, claimant's attorney also inquired into such areas as to how Dr. Littell obtained his position with respondent, what his duties were for respondent, the procedure for reviewing a worker's health history, when additional medical information should be requested, and the procedure utilized when information was discovered that contradicted information provided by a worker. In short, Dr. Littell did not testify as an expert witness but, instead, as a fact witness.

There is no dispute Dr. Littell has billed claimant's attorney $450 for the May 30, 2008, deposition. But the parties do dispute who should pay the bill and whether Dr. Littell should be paid as an expert witness or as a fact witness.

The director and administrative law judges may order witnesses to appear for depositions.[19] Witness fees for appearing before the administrative tribunal are generally governed by K.S.A. 44-553, which provides:

> Each witness who appears before the director or administrative law judge in response to a subpoena shall receive the same fee and mileage as is provided for witnesses attending district courts in civil cases in this state. The director or the

[19] See K.S.A. 44-554.

> administrative law judge, whoever is conducting the hearing, shall tax and apportion the costs of such witness fees in the discretion of the director or administrative law judge, as the case may be, and shall make such orders relative to the payment of such fees as the director or the administrative law judge deems expedient in order to secure and provide for the payment of the witness fees.

The Board finds and concludes that Dr. Littell appeared in this proceeding as a fact witness. Accordingly, his fee is governed by K.S.A. 44-553, which limits his fee to that provided for witnesses attending district courts in civil cases in this state. The Board also concludes that Dr. Littell's witness fee should be paid by respondent.

Task loss

Dr. Do reviewed a list of work tasks prepared by claimant's labor market expert, Jerry D. Hardin. That list included the tasks claimant performed in the 15 years before his June 22, 2005, accident. Dr. Do adopted Mr. Hardin's analysis and opined that claimant had lost the ability to perform 47 of the 53 nonduplicative tasks, or 89 percent due to his work-related accident.

Although Dr. Murati concluded claimant was essentially and realistically unemployable, the doctor also indicated claimant was unable to perform 46 of the 53 nonduplicative tasks, or 87 percent, in the task list compiled by Mr. Hardin.

Dr. Fevurly reviewed the task loss information compiled by respondent's vocational expert, Dan R. Zumalt. The doctor, however, was unable to provide an opinion regarding claimant's task loss as he felt there was not enough information for him to make a reasonable assessment.[20]

The Board rejects respondent's argument that claimant should be penalized and given a zero percent task loss. First, the Board is not convinced claimant did not cooperate with respondent's vocational rehabilitation expert. But more importantly, the Board is unaware of any statute in the Workers Compensation Act or any administrative regulation that provides such a sanction should respondent's allegations be true.

Based upon Dr. Do's testimony, the Board finds claimant has sustained an 89 percent task loss due to his June 2005 accident and the resulting low back injury.

[20] Fevurly Depo. at 26.

Wage loss

As previously indicated, claimant was not working when he last testified. Accordingly, claimant has sustained a wage loss of 100 percent.

Permanent partial general disability

Because claimant's back injury is not compensated under the schedule in K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

After the record had closed, the Kansas Supreme Court issued its decision in *Bergstrom.*[21] In that decision the Kansas Supreme Court interpreted K.S.A. 44-510e and ruled that it was not proper to impute a post-injury wage when calculating the wage loss in the statute's permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[22]
>
> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[23]

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[21] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[22] *Id.*, Syl. ¶ 1.

[23] *Id.*, Syl. ¶ 3.

> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[24]

Without *Bergstrom*, the circumstances surrounding claimant's termination would have been an issue for the Board to consider in determining whether claimant's actual post-injury wages should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid.

Respondent argues that *Bergstrom* does not apply because the facts are distinguishable as claimant was purportedly fired for cause. The Board disagrees. For the Board to make that distinction it would be creating an exception to using actual wage loss, which K.S.A. 44-510e requires. *Bergstrom* provides that it is improper to apply exceptions to the work disability formula as the statute is clear and unambiguous. Consequently, the Board concludes claimant's actual post-injury earnings should be used in computing his permanent partial general disability.

Averaging claimant's 100 percent wage loss with his 89 percent task loss creates a 94.5 percent permanent partial general disability.

Attorney fee liens

Mr. Riedmiller is the third attorney to appear for claimant in these proceedings. Claimant's first attorney, Gary K. Albin, filed a lien for attorney fees. Claimant's second attorney, Dale V. Slape, filed both a written contract of employment and a lien for attorney fees. As far as we can discern, neither Mr. Albin nor Mr. Riedmiller have filed their employment contracts.

[24] *Id.*, at 609-610.

> All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents, which shall be subject to approval by the director in accordance with this section. . . .[25]

> Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.[26]

The Board concludes that portion of the June 5, 2009, Award granting attorney fees should be set aside. That issue, and that issue only, is remanded to the Judge for further consideration after notice to all three attorneys and giving them an opportunity to present their claims for fees and expenses.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[27] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 5, 2009, Award entered by Judge Barnes.

Marcus J. Butler is granted compensation from Cessna Aircraft Company for a June 22, 2005, accident and resulting disability. Based upon an average weekly wage of $657.88, Mr. Butler is entitled to receive 17.71 weeks of permanent partial general disability benefits at $438.61 per week, or $7,767.78. Based upon an average weekly wage of $873.51, Mr. Butler is entitled to receive 26.43 weeks of temporary total disability benefits at $449 per week, or $11,867.07, plus 178.99 weeks of permanent partial general disability benefits at $449 per week, or $80,365.15, for a 94.5 percent permanent partial general disability. The total award is $100,000, which is all due and owing less any amounts previously paid.

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[25] K.S.A. 44-536(b).

[26] K.S.A. 44-536(h).

[27] K.S.A. 2008 Supp. 44-555c(k).

That portion of the June 5, 2009, Award granting attorney fees is set aside. This issue, and this issue only, is remanded to the Judge for further consideration after notice to all three attorneys and giving them an opportunity to present their contracts and claims for fees and expenses.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Gary K. Albin, Former Attorney for Claimant
Dale V. Slape, Former Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge